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Legal Issues Related to Creation, Banking and Use of Emission Reduction Credits (ERCs) Part 2. The Public Trust Doctrine

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LEGAL ISSUES RELATED TO CREATION, BANKING AND USE OF EMISSION REDUCTION CREDITS (ERCs)

PART II: The Public Trust Doctrine -- Does the Public Trust Doctrine Interfere with a State's Granting Emission Reduction Credits to Private Industry?

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May 1984

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The views expressed in this paper are offered for general guidance and do not necessarily represent the official policy of the U.S. Environmental Protection Agency

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Barry S. Elman

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Enclosure: LEGAL ISSUES RELATED TO CREATION, BANKING AND USE OF EMISSION REDUCTION CREDITS (ERCs); PART II: The Public Trust Doctrine--Does the Public Trust Doctrine Interfere with a State's Granting Emission Reduction Credits to Private Industry? (EPA 230-02-84-004)

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Background: Emissions Trading involves the creation of surplus pollution reductions (Emission Reduction Credits) at certain emission sources and use of these reductions to meet requirements applicable to other emission sources. The public trust doctrine holds that some public resources, notably land, are held in trust by the state for the public. Insofar as an Emission Reduction Credit (ERC) might be construed as a private right in a public resource (air), the doctrine may be of concern to states adopting an emissions trading program.

Conclusions: (1) At most, the public trust doctrine is common law, and presumably a properly enacted state regulatory program (enacted under state and federal statute) would preempt a common law doctrine.
(2) The only consistent reading of the public trust doctrine is that the state must administer public property in a way that ensures broad public use for all purposes. An emissions trading program is consistent with this end, allocating competing uses of a limited resource.
(3) An ERC program does not conflict with the public trust doctrine, and the doctrine should prove no obstacle to Emissions Trading.

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SUMMARY: EMISSIONS TRADING AND THE PUBLIC TRUST DOCTRINE

BACKGROUND

The public trust doctrine holds that some public resources, notably land, are held in trust by the state for the public. At a mimimum this means that, for certain resources, the state may not abdicate its trust responsibility in administering the resource for the benefit of the public. More expansively, the doctrine may be read to place restrictions on the private use of public resources. Insofar as an Emission Reduction Credit (ERC) might be construed as a private right in a public resource (air), this may be of concern to states adopting an emissions trading program.

DISCUSSION

The proposition that the public trust doctrine prevents the establishment of ERCs is challenged on two points.

1) At most, the public trust doctrine is common law, and presumably a properly enacted state regulatory program (enacted under state and federal statute) would preempt a common law doctrine.

2) The only consistent reading of the public trust doctrine is that the state must administer public property in a way that ensures broad public use for all purposes. An emissions trading program is consistent with this end, allocating competing uses of a limited resource.

Also discussed is the lack of legal precedent for expanding the public trust doctrine to air; the doctrine's inappropriateness as a legal tool for protecting air; the prepossessing nature of the doctrine, revolving around the definition of "use"; and the fact that any challenge to the state's granting of private pollution credits within the standards set by the Clean Air Act is a challenge to the Clean Air Act's emission standards rather than to the emissions trading program.

CONCLUSION

The doctrine of public trust has largely been eclipsed by advances in legal theory involving the proper allocations of limited resources. Moreover, an ERC program does not conflict with the traditional principles underlying the public trust doctrine, and the doctrine should prove no obstacle to the establishment of an ERC program.

LEGAL ISSUES RELATED TO CREATION, BANKING AND USE OF ERCs

Part II: The Public Trust Doctrine*. Does creation of a "private right" in pollution through use of Emission Reduction Credits for Emission Trading violate a government-held public trust in clean air? Do state rules defining Emission Reduction Credits (i.e., emission reductions which are surplus, permanent, quantifiable and enforceable) and granting them legally-protected status consistent with Federal and state clean air acts, invoke the doctrine in ways which would invalidate such rules? As we discuss below, these are largely, if not exclusively, questions of state rather than Federal law.

A. What is the Public Trust Doctrine?

The public trust doctrine consists of several common law principles which limit the ability of a state to sell or change the use of property it holds in trust for the public.[1] Trust property under the doctrine typically includes tidelands, harbors, navigable waters, and parkland.[2] Some writers have suggested that the list of property covered by the doctrine should be

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*Initial draft and substantial revision by Keith M. Baxter, a student intern from Georgetown University Law Center.

[1] See generally, Rodgers, Handbook on Enviromental Law §216 (1977).

[2] Id. p.172; Shively v. Bowlby, 152 U.S. 1 (1894) (public right in land under tide waters along a river); Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892) (grant of Chicago's harbor area to private interest); Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937) (public right to hay grown on dry lake bed); Gould v. Greylock Reservation Commision, 350 Mass 410, 215 N.E.2d 114 (1966) (proposed use of parkland for ski resort).

expanded to include air and other natural resources not capable of self-regeneration.[3] However, the courts have generally refused to effect such an expansion.[4]

The purpose of the public trust doctrine is not to prevent the use of a resource, but to ensure its broadest possible public use while preventing monopolization by a few private interests[5]. Consistent with broad public use may be the grant of parcels to private interests which will use the property in a manner that increases the public benefit.[6] The courts have been very flexible in defining such acceptable uses of public trust properties.[7] The doctrine's furthest reach, established by the Supreme Court in Illinois Central Railroad v. Illinois is that the government may not unduly abdicate its administration of the trust.[8]

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[3]Cohen, The Constitution, The Public Trust Doctrine, and the Environment, 1970 Utah L. Rev. 388; Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Michigan L. Rev. 473 at 556-57 (1970).

[4] Sax Id.; Rodgers supra note 1, at 173.

[5] Illinois Central, 146 U.S. at 452. Justice Field, referring to the title Illinois held in the navigable waters of Lake Michigan, wrote: "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, there in freedom from the obstruction or interference of private parties."

[6] 146 U.S. at 453. "The State [may not] abdicate its trust over property...except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains...."

[7] E.g., New Jersey Sports and Exposition Authority v. McCrane, 61 N.J. 1, 292 A.2d 545 (1972) (use of state wetlands for sports stadium approved); Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 cert. denied, 280 U.S. 517 (1929) (leasing of tidelands for oil development approved); Paepcke v. Public Bldg. Comm'n, 46 Ill. 2d 330, 263 N.E.2d 11 (1970) (use of parkland for school facilities approved).

[8] 146 U.S. at 387.

In Illinois Central, the 1873 Illinois legislature cancelled a grant made to a private railroad company, of virtually all of the commercial waterfront of Chicago. The Supreme court found the original conveyance invalid, because the state held the harbor area in trust for the use of the public and the legislature's large grant unduly relinquished the the state's control over the property. The court noted that Illinois held title to the harbor

> "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."[9]

The court concluded:

> "The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein..."[10]

B. Public Trust Doctrine and ERCs

The public trust doctrine may affect ERCs in three ways: (1) if the state has incorporated the public trust doctrine into its constitution or statues, they may conflict with the state's ERC trading rules[11], (2) if the public trust doctrine was part of the state's common law at the time of enactment of the state pollution control laws, the doctrine may be read into relevant enabling legislation in ways which suggest that ERC rules exceed

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9 Illinois Central, at 452.

10 Id. at 453.

11 Frye, Environmental Provisions in State Constitutions, 5 ELR 50028 (1978).

the relevant legislative charter;[12] and (3) if, as some writers have suggested, the doctrine is of quasi-constitutional magnitude, state ERC rules may breach the Federal Constitution.[13]

For most states, (1) is no problem. Although several states have made constitutional or statutory commitments to protect the environment, only Pennsylvania and Michigan appear to have used explicit public trust language.[14] Cases (2) and (3) are unlikely to be a problem since state statutes frequently overrule state common law and (3) has received little support from the courts.[15]

Even if the doctrine were applicable, it is doubtful that ERCs contravene it. In any attempt to apply the doctrine to ERCs, three questions arise: (1) is protection of clean air a proper extension of the public trust doctrine?; (2) if clean air is properly a public trust, is granting credit for ERCs inconsistent with broad public use of the air?; and (3) since ERCs in theory cannot increase the level of air pollution above a statutorily-authorized maximum, can the public trust doctrine invalidate the use of

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[12] Administrative Procedure Act, 5 U.S.C.A § 706 (2)(D)(2)(C)(1976)(allowing court to set aside agency action as contrary to statutory command).

[13] Cohen, supra note 3, at 388, suggests that the public trust doctrine may attain constitutional dimensions through a flexible reading of the Ninth and Fourteenth Amendments.

[14] Pa. Const. Art. 1 §27; Rodgers, supra note 19, at 173.

[15] See, e.g., New Jersey Sports and Exposition Authority v. McCrane, 292 A.2d 619 (1972) (expressly repudiates a constitutional public trust doctrine). See also, Frye supra note 11, at 50028 ("The federal courts have almost unanimously rejected all arguments that the 5th, 9th or 14th Amendments might be construed to contain a right to a decent environment." [and therefore, a constitutional right based on the public trust doctrine]).

ERCs without also invalidating the state pollution control statues and regulations establishing that maximum? In short, if the state's fundamental pollution control program does not violate the doctrine, use of ERCs to achieve the goals of that program would not seem to.

1. The air as a public trust

Application of the public trust doctrine to air pollution would be a novel extension.[16] Though some writers have suggested that the doctrine may be enlarged to include all natural resources whose preservation is important to society, the courts have declined to follow this lead.[17] Some of this hesitancy in extending the doctrine to air may stem from the lack of a clear legal tradition of private air ownership. Since legal ability to "own air" is not well defined, and the incidents of such ownership will inevitably be more constricted than private ownership of, e.g., land, because of the nature of the resource, that "ownership" presents much less danger that the state will alienate its rights in the air in a way that a public trust would prevent.[18] Moreover, since the law of nuisance is generally available to resolve conflicting private uses of the air where these arise, there has been little reason for courts to extend the doctrine to provide a vehicle

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[16] Rodgers, supra note 1, at 123.

[17] However, the public trust doctrine has been extended by statute to include air in Michigan. Mich. Comp. Laws Ann. §691-1202 (1)(1970).

[18] See, e.g., Hinman v. Pacific Air Transport, 84 F.2d 755 (CCA Cal. 1936)(air by its nature incapable of private ownership, except insofar as one may use it).

for resolution.[19]

2. ERCs as a permissible use under a public trust

Even if a resource is a public trust, this does not mean it must be publicly owned. The state is not prohibited from granting private interests use of or title to trust property in order to advance the public good, so long as such grants do not substantially impair the state's authority over the administration of the resource.[20] Sinces ERCs are part of a state's affirmative administration of its air resources, and are subservient to the state's pollution control programs, it is unlikely that granting credit for ERCs would be considered an impermissible abdication of state authority.[21] Moreover, since the "private rights" created by ERCs reduce the cost and time of complying with air pollution standards without increasing overall pollution levels, it seems clear that grants of ERCs do advance the public good. Even if individual ERC transactions should increase the level of emissions or ambient pollution (as they may, for example through use of an allowables baseline in particular bubbles, or though a "netting" transaction which increases plant-wide emissions by less than a "significant" amount of, e.g., 40 tons per year), and even if such

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19 See generally, Rodgers, supra note 1, §2.2 at 106

20 Sax, supra note 3, at 482. "To accept such claims of [public] property rights would be to prohibit the government from ever accommodating new public needs by reallocating resources. Certainly any such notion strikes at the very essence of government power, and acceptance of such a theory by a court would be as unwise as it is unlikely."

21 See generally, Proposed Emissions Trading Policy Statement; General Principles for Creation, Banking, and Use of Emission Reduction Credits and accompanying Technical Issues Document, 47 Fed. Reg. 15,076 (April 7, 1982).

transactions should be held to dominate the state's whole pollution control program, the doctrine should not be invokable. In the first place, such complaints go to particular uses of ERCs, not the creation of a general property "right" for the express purpose of promoting clean air, which may be put to many uses consistent with that purpose. Second, and more important, all such uses must be consistent with timely attainment of overall pollution levels, which is what, after all, pollution control programs are ultimately concerned with. A state cannot approve a bubble based on allowable emissions in an actual emission baseline area, for example, without finding that approval will neither cause a new ambient violation nor delay the planned removal of an existing one. And even "insignificant" emission increases from netting transactions must be compensated by extra reductions elsewhere to preserve the area's "Reasonable Further Progress" line[22]. Finally, to the extent individual ERC uses contravene these or related principles, they may be corrected under organic state or Federal pollution-control legislation, without reference to any broader and less well defined doctrine.

The key, it would seem, is to carefully define "property" rights in ERCs as contingent upon the state's ability to achieve its pollution control mandates. The EPA has explicity addressed ways states may do so, while providing substantial ERC certainty and predictability[23]. Once such a definition is effected,

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[22] Id.

[23] Id. at 15078, 15083-84.

the public trust doctrine should not be able to be successfully invoked.

3. A necessary challenge to state pollution control programs?

Arguably, a reasonable use of the air for the discharge of emmissions may be a public use more closely analogous to the type of uses traditionally protected by the public trust doctrine, than protection of the air from any use or pollution whatsoever.[24] In general, the doctrine of public trust provides little guidance as to the scope of the trust and at the common-law level may be viewed as a legal fiction that has been largely eclipsed by advances in nuisance law propounded by Coase and others.[25]

In any event, assuming the trust charged to the government is that of keeping the air clean, any challenge to an ERC program relying on the public trust doctrine must also challenge the state's specific clean air standards and emission limitations, since a properly administered ERC program will not increase

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[24] Sax derives several rules used by the courts in determining whether the public trust has been violated. One of these tests is whether the resource is being used for its natural purpose. Sax notes this test is seldom employed with rigor. Sax, supra note 3, at 525.

[25] How one describes the nature of the public trust--either as preserving the free use of the air by the public (including pollution), or as preserving the air but not its free use (pollution excluded)--decides the question of whether there has been a violation of the public trust doctrine. Industry use of the air for emissions is at least in theory a part of the public use. In any competing use of a limited resource, it is meaningless to speak only of the costs imposed by one party; costs and nuisance are reciprocal. Simply to preserve the public trust has no significance absent a balancing of relevant interests. Coase, The Problem of Social Cost, 3 Journal of Law and Economics 1 (1960).

aggregate pollution above these standards or limits. It is unlikely that use of ERCs would in any way increase the potential success of such a challenge, which inevitably rests on the claim that public-trust obligations mandate zero pollution in every case.

C. Conclusions

As a common law principle, the public trust doctrine is unlikely to constrain the use of Emission Reduction Credits. Even in states with specific constitutional or statutory provisions it is doubtful whether ERCs would present a problem, since they threaten no increase over presumptively legitimate state-regulated pollution levels. They therefore represent no abandonment--much less a substantial abdication--of the state's responsibility for clean air held in trust for the public.